

EXHIBIT 3

Hearing

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHILLIPS, L.G., LCD CO., LTD,)
)
Plaintiffs,) C.A. No. 04-343(JJF)
)
v.)
)
TATUNG CO., TATUNG COMPANY OF)
AMERICA, INC., and VIEWSONIC)
CORPORATION,)
)
Defendants.)

Hearing of above matter taken pursuant to notice before Renee A. Meyers, Registered Professional Reporter and Notary Public, in the law offices of BLANK ROME, LLP, 1201 North Market Street, Wilmington, Delaware, on Wednesday, January 3, 2007, beginning at approximately 11:37 a.m., there being present:

BEFORE: VINCENT J. POPPITI, SPECIAL MASTER

APPEARANCES:

THE BAYARD FIRM
RICHARD D. KIRK, ESQ.
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for Plaintiffs

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<p>1 SPECIAL MASTER POPPITI: That's right.</p> <p>2 The December 19th application responded to December 28th.</p> <p>3 MS. MASON: I just wanted to add that</p> <p>4 the positions that we take in that motion to compel</p> <p>5 plaintiff to participate in deposition discovery would</p> <p>6 still be valid. I mean, we would still maintain the</p> <p>7 position that it is not proper to hold witnesses for</p> <p>8 deposition dates so close to the end of the discovery</p> <p>9 period.</p> <p>10 Obviously, the positions would still</p> <p>11 remain valid, but given that now Your Honor has made the</p> <p>12 suggestion to have an ex parte discussion with the Court,</p> <p>13 that changes the landscape a bit.</p> <p>14 SPECIAL MASTER POPPITI: Okay.</p> <p>15 MR. MERIDETH: May I make a suggestion?</p> <p>16 SPECIAL MASTER POPPITI: Yes, please.</p> <p>17 MR. MERIDETH: I believe that it would</p> <p>18 be worthwhile, assuming the potential of your meeting</p> <p>19 with the Court, I think you said January 12th, that we</p> <p>20 confer with our clients and each other over potential</p> <p>21 deposition dates following that date so that at least we</p> <p>22 know what the availability is and we can resolve issues</p> <p>23 that are pending.</p> <p>24 I think we may have some tentative</p>	<p>1 then wind up with different applications on my desk and a</p> <p>2 need to -- a need to shoehorn you in to a hearing date.</p> <p>3 MS. MASON: I think it would be useful</p> <p>4 to have Your Honor set a date by which we would report to</p> <p>5 you as the deadlines you were setting during the</p> <p>6 teleconference last week.</p> <p>7 SPECIAL MASTER POPPITI: Any proposal</p> <p>8 with respect to those deadlines?</p> <p>9 MS. MASON: I am sorry, Your Honor. You</p> <p>10 were cut off the beginning of that sentence.</p> <p>11 SPECIAL MASTER POPPITI: Does anyone</p> <p>12 have a proposal with respect to what you just suggested</p> <p>13 because your suggestion makes sense to me?</p> <p>14 MR. CHRISTENSON: Your Honor, I propose</p> <p>15 that we have discussions among counsel by no later than</p> <p>16 next week and then report to you promptly thereafter.</p> <p>17 SPECIAL MASTER POPPITI: "No later than</p> <p>18 next week" being the week of the 12th?</p> <p>19 MR. CHRISTENSON: The week of January 8,</p> <p>20 Your Honor.</p> <p>21 SPECIAL MASTER POPPITI: Week of January</p> <p>22 8th, yeah.</p> <p>23 MR. CHRISTENSON: Which ends on the</p> <p>24 12th, that is correct.</p>
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<p>1 agreements, but they have not been finalized as to the</p> <p>2 place of the depositions, whether some of the depositions</p> <p>3 that have been noticed are duplicative with respect to</p> <p>4 the witnesses and how we are going to handle the 30(b)(6)</p> <p>5 representatives with respect to their individual</p> <p>6 testimony. All of that can be resolved regardless of the</p> <p>7 timing.</p> <p>8 SPECIAL MASTER POPPITI: I would agree.</p> <p>9 MR. CHRISTENSON: Your Honor, I agree as</p> <p>10 well. We are, as Mr. Merideth says, in discussions as to</p> <p>11 location. We have made a proposal on that.</p> <p>12 We are also going to have discussions</p> <p>13 regarding objections to 30(b)(6) topics, and, so, those</p> <p>14 discussions, I agree, should proceed, and hopefully we</p> <p>15 can resolve as many of those issues as possible and then</p> <p>16 we can see if the timing issue resolves itself.</p> <p>17 SPECIAL MASTER POPPITI: Okay. And I am</p> <p>18 rather optimistic with respect to the timing issues.</p> <p>19 With respect to issues involving subject</p> <p>20 matter and location, am I going to need to reserve time,</p> <p>21 and, if you will, impose deadlines similar to those</p> <p>22 imposed in the January 3rd, 2007, correspondence?</p> <p>23 What I don't want to happen is for your</p> <p>24 meet and confers to be respectful but unproductive and</p>	<p>1 MR. MILLER: Your Honor, I guess,</p> <p>2 perhaps, we could report to you by noon your time on the</p> <p>3 11th so that you have it before your meeting with the</p> <p>4 Court on the 12th to the extent that it's informative to</p> <p>5 you for any purpose.</p> <p>6 SPECIAL MASTER POPPITI: It may be</p> <p>7 informative to me for the purpose of understanding the</p> <p>8 entire landscape. So let's, you know, why don't you</p> <p>9 report to me with respect to that issue not later than</p> <p>10 noon on the 11th.</p> <p>11 MR. CHRISTENSON: Very well, Your Honor.</p> <p>12 SPECIAL MASTER POPPITI: And that's both</p> <p>13 with respect to location and subject matter. Anything</p> <p>14 else on the application that we have been focused on?</p> <p>15 MR. MILLER: I think that, as Ms. Mason</p> <p>16 indicated, I think, at this point, holding it in abeyance</p> <p>17 until we see what happens vis-a-vis these other issues is</p> <p>18 probably appropriate.</p> <p>19 SPECIAL MASTER POPPITI: Hearing no</p> <p>20 disagreement, let's re-group on several things that I</p> <p>21 think needed additional -- needed some additional</p> <p>22 attention.</p> <p>23 On the issue of control for purposes of</p> <p>24 focusing on the application dealing with documents that</p>

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<p>1 are in the possession of OEMs that the defendants suggest</p> <p>2 that LPL has access to and control over, my question is</p> <p>3 this: I believe that I have some excerpt quotes from an</p> <p>4 OEM document, but I do not believe that I have the entire</p> <p>5 document; is that correct or am I mistaken?</p> <p>6 MR. KIRK: I just missed, if you were</p> <p>7 speaking, I missed a bunch of it.</p> <p>8 SPECIAL MASTER POPPITI: Oh, I was. I</p> <p>9 am sorry.</p> <p>10 My question is: Do I have, in these</p> <p>11 papers, and I suggest I don't think I have, the entire</p> <p>12 document that was an OEM document referred to as the --</p> <p>13 MR. KIRK: The Jean OEM agreement, Your</p> <p>14 Honor?</p> <p>15 SPECIAL MASTER POPPITI: That's correct.</p> <p>16 MR. KIRK: I did send that in it</p> <p>17 entirety in a PDF. I am not sure that -- I should have</p> <p>18 copied it and sent you a hard copy, and I will do that</p> <p>19 right now, but I sent it to you on Thursday morning</p> <p>20 during our call, and I can re-send it right now.</p> <p>21 SPECIAL MASTER POPPITI: And I apologize</p> <p>22 for not having retrieved that, Mr. Kirk. I don't know</p> <p>23 why that I didn't, but if you will send that now.</p> <p>24 MR. KIRK: I will re-send it right now</p>	<p>1 SPECIAL MASTER POPPITI: That's fine.</p> <p>2 MS. BRZEZYSKI: Quote, Supplier shall,</p> <p>3 at all times, use commercially reasonable efforts to</p> <p>4 ensure its partnership's support under this agreement,</p> <p>5 end quote. And I bring that to your attention because I</p> <p>6 think that that language is very telling and it's very</p> <p>7 indicative of the close relationship between Viewsonic</p> <p>8 and its OEMs to manufacture Viewsonic's products and to</p> <p>9 ensure that Viewsonic has the steady supply that it</p> <p>10 requires. And I think that that language there is very</p> <p>11 telling of the import of the other excerpts we brought to</p> <p>12 your attention in that they clearly show an absolute</p> <p>13 legal right to the documents by Viewsonic.</p> <p>14 Viewsonic -- you know, this is a</p> <p>15 Viewsonic form agreement. Viewsonic must have included</p> <p>16 the custody and control provisions so that it could</p> <p>17 control the manufacture of its products and have access</p> <p>18 to all the documents at any time in the ordinary course</p> <p>19 of its business. And, so, I wanted to bring that</p> <p>20 partnership language to your attention because I think</p> <p>21 it's very telling, in particular.</p> <p>22 That was the only other language I</p> <p>23 wanted to bring to your attention, in addition to the</p> <p>24 excerpts already brought.</p>
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<p>1 and then I will also copy it. It 90 pages. And we will</p> <p>2 get it sent to you immediately.</p> <p>3 SPECIAL MASTER POPPITI: Then let me ask</p> <p>4 the question, as you are re-sending it: Have you asked</p> <p>5 me to focus on any other language in that document other</p> <p>6 than the language that you brought to my attention</p> <p>7 earlier?</p> <p>8 MS. BRZEZYSKI: In addition to the</p> <p>9 language that was brought to your attention earlier in</p> <p>10 the form of excerpts from the OEM agreement, I also would</p> <p>11 like to bring to your attention specific language on page</p> <p>12 3 of that agreement and the Bates No. is VS 025139, and I</p> <p>13 want to bring to your attention specifically Section P,</p> <p>14 paragraph four, and that paragraph has some interesting</p> <p>15 language suggesting a partnership between Viewsonic and</p> <p>16 its OEMs to manufacture products for Viewsonic pursuant</p> <p>17 to Viewsonic's specifications.</p> <p>18 SPECIAL MASTER POPPITI: For purposes of</p> <p>19 -- how long is the language? Do you want to read it to</p> <p>20 me now just for purposes of my understanding what you are</p> <p>21 referring to? I will look at the language. I am not in</p> <p>22 a room where I have access to a computer right now.</p> <p>23 MS. BRZEZYSKI: All I want to do is -- I</p> <p>24 will read you the one clause.</p>	<p>1 I do, when you get the full agreement, I</p> <p>2 would like it, if you could, Your Honor, look at the</p> <p>3 entire language that we excerpted. In some respects, we</p> <p>4 had to, you know, included listings so that it would be</p> <p>5 shortened for the written document we provided to you.</p> <p>6 I think the entire document retention</p> <p>7 language, in paragraph 10.9 of the agreement, is very</p> <p>8 important for you to read.</p> <p>9 SPECIAL MASTER POPPITI: So you are</p> <p>10 suggesting I should open my drawer and take out that</p> <p>11 tooth comb? I guess not.</p> <p>12 MS. BRZEZYSKI: I think the --</p> <p>13 certainly, I think we gave you the most important</p> <p>14 excerpts for you to read, but within those excerpts,</p> <p>15 there is some additional words that I think it's</p> <p>16 important for you to see the entire language.</p> <p>17 SPECIAL MASTER POPPITI: But by virtue</p> <p>18 of focusing on the language that you just focused on, are</p> <p>19 you in any way suggesting that there is a -- that the</p> <p>20 partnership that you are referring to, you are not</p> <p>21 suggesting that that is an entity; correct?</p> <p>22 MS. BRZEZYSKI: No. Your Honor, I am</p> <p>23 not suggesting that it's a separate entity. We don't</p> <p>24 have any -- any information to suggest there is a</p>

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<p>1 separate entity created.</p> <p>2 SPECIAL MASTER POPPITI: Right.</p> <p>3 MS. BRZEZYSKI: You know, a separate</p> <p>4 formal partnership.</p> <p>5 SPECIAL MASTER POPPITI: Okay. I</p> <p>6 understand that. And I do have a question, and I expect</p> <p>7 that, perhaps, Mr. Miller may want to weigh in and</p> <p>8 perhaps some others. I certainly reviewed the cases that</p> <p>9 you brought to my attention by Mr. Kirk's December 29,</p> <p>10 2006, e-mail, and I want you, if you have that available</p> <p>11 to you, I am looking at the Inline Connection Corporation</p> <p>12 case that was penned by Magistrate Mary Pat Thyng. If</p> <p>13 you will take just a moment to access that, that may be</p> <p>14 helpful.</p> <p>15 MS. MASON: Your Honor, the Inline case</p> <p>16 was actually sent by me on behalf of Viewsonic.</p> <p>17 SPECIAL MASTER POPPITI: Do you want to</p> <p>18 speak to that?</p> <p>19 MS. MASON: Yes, Your Honor.</p> <p>20 SPECIAL MASTER POPPITI: What I'd like</p> <p>21 -- do you have that up at this point?</p> <p>22 MS. MASON: I do, Your Honor.</p> <p>23 SPECIAL MASTER POPPITI: Tell me why you</p> <p>24 brought Magistrate Thyng's decision to my attention.</p>	<p>1 Novartis, the Court says, It is rare to compel the</p> <p>2 production of documents in the absence of apparent and</p> <p>3 subsidiary relationship. There is no such relationship</p> <p>4 in this case. There is no partnership despite the</p> <p>5 excerpt of the language that was just cited to Your</p> <p>6 Honor. And there and under the facts in the law, LPL</p> <p>7 hasn't met its burden of proving legal control.</p> <p>8 SPECIAL MASTER POPPITI: Let me ask you</p> <p>9 this question: I understand that a partner subsidiary</p> <p>10 relationship may be, and I will use the language of your</p> <p>11 loyal opposition, it may be sufficient, but not</p> <p>12 necessary, and the reason why I want to frame it -- my</p> <p>13 question against that backdrop is this: If you will take</p> <p>14 a look at page 3, and this is of Magistrate Thyng's</p> <p>15 decision, what I expect she is saying, when she uses the</p> <p>16 following language -- let me use the language first and</p> <p>17 then I will tell you what I expect she is saying and I</p> <p>18 want you to speak to it.</p> <p>19 I understand the context in which she</p> <p>20 says there is no parent subsidiary relationship here. I</p> <p>21 understand that she says that the Circuit has not</p> <p>22 accepted the practical access to it as opposed to the</p> <p>23 absolute right, namely, the control to have access, but</p> <p>24 she does say, at below -- below note ten, and let me read</p>
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<p>1 MS. MASON: Your Honor, for a few</p> <p>2 reasons; the first being that it reiterates the standards</p> <p>3 in the Third Circuit, that it is LPL's, the plaintiffs,</p> <p>4 burden to prove legal control, and under the facts and</p> <p>5 the law in this case, they cannot prove it between</p> <p>6 Viewsonic and Jean.</p> <p>7 The most pertinent part of the case,</p> <p>8 being where Judge Thyng distinguishes the Mercy Catholic</p> <p>9 decision, it is in the Inline case, which I actually have</p> <p>10 as a Lexus reported decision, 2006 U.S. District Lexus</p> <p>11 72724 at star two, and, there, Judge Thyng conducts an</p> <p>12 analysis of Mercy Catholic and talks about the practical</p> <p>13 ability to obtain documents as being the same as legal</p> <p>14 control.</p> <p>15 Later on in the decision, Judge Thyng</p> <p>16 conducts an analysis and rejects that practical ability</p> <p>17 and also cites to a decision where Judge Farnan does as</p> <p>18 well.</p> <p>19 It's clear, we believe, under the Inline</p> <p>20 decision, and under Novartis, which was also cited to</p> <p>21 Your Honor, that more is required to compel the</p> <p>22 production of documents.</p> <p>23 As Judge Thyng makes clear in this</p> <p>24 decision, you need apparent subsidiary relationships. In</p>	<p>1 it, please, "In the present case, there is no evidence</p> <p>2 which suggests that AOL and EarthLink had possession or</p> <p>3 custody of the RT deployment information. Rather, the</p> <p>4 gist of InLine's argument is that AOL and EarthLink did</p> <p>5 not satisfy their discovery obligations by producing</p> <p>6 information which was purportedly, quote, available,</p> <p>7 close quote, to them upon request from the TELCOS,</p> <p>8 T-E-L-C-O-S.</p> <p>9 "Inline, apparently, relies on</p> <p>10 deposition testimony of AOL's damage's expert, Julie</p> <p>11 Davis. According to Ms. Davis, hypothetically, AOL could</p> <p>12 have obtained the RT deployment information from the</p> <p>13 TELCOSs by making it part of the contractual</p> <p>14 arrangement." Then there is a reference to the</p> <p>15 deposition.</p> <p>16 She goes on to say, "The fact that AOL</p> <p>17 hypothetically could have pursued a contractual provision</p> <p>18 during negotiations which provides AOL a right of access</p> <p>19 to RT deployment information is irrelevant to the</p> <p>20 determination of whether AOL and EarthLink presently have</p> <p>21 or had legal control of the RT deployment information</p> <p>22 because there is no evidence," and let me emphasize this,</p> <p>23 "there is no evidence that such a contractual provision</p> <p>24 exists."</p>

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<p>1 Now, what I think Magistrate Thyng is 2 saying is, Given the facts of the case that she had 3 before her, there was no contractual provision that would 4 have permitted access, and I think what she is saying is, 5 Had there been one, I think she would have written this 6 decision differently.</p> <p>7 How do you read her language? And once 8 you describe that, I'd like some response to it from the 9 other side.</p> <p>10 MS. MASON: Your Honor, I would read her 11 language, continuing down in the paragraph from which 12 Your Honor was just reading, Judge Thyng goes on to say 13 "Under the law of the Third Circuit, the mere fact that 14 EarthLink may be able to obtain the information, if it 15 had a business or other reason to do so, is irrelevant to 16 the issue of control".</p> <p>17 SPECIAL MASTER POPPITI: I understand 18 that.</p> <p>19 MS. MASON: Right. And I believe that 20 that's pertinent to our analysis in this case. We -- the 21 agreement and the excerpt that was sent to Your Honor 22 talks about access to documents from suppliers; however, 23 it's not the same and it doesn't rise to the same level 24 of the legal control the law that states that you have to</p>	<p>1 Farnan's writing in Novartis, the access there, and I am 2 looking at the first full paragraph right before note 3 ten, "The agreement grants Eon, E-o-n, the right to use 4 Hexal's, H-e-x-a-l-'s technical information which 5 comprises of the Hexal file in developing products for 6 sale in the United States."</p> <p>7 Now, as I understand the record in that 8 case, as Judge Farnan described it, records with respect 9 to the Hexal files that were actually used in the 10 development of sale, of products for sale in the United 11 States, had been produced.</p> <p>12 The question before Judge Farnan was 13 whether all Hexal files should be produced. And he said, 14 No, because there was not the right of full access. And 15 the reason why I think he said that is that it only 16 related to a practical right of access, namely, the right 17 when you are using those files to develop products for 18 sale in the United States.</p> <p>19 Isn't that what he did in Hexal? 20 MS. MASON: Yes, Your Honor. 21 SPECIAL MASTER POPPITI: So, Hexal 22 really doesn't help us here, does it? 23 MS. MASON: Hexal would help us to the 24 extent that there were the contractual provisions in</p>
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<p>1 -- you can obtain the documents on demand and that you 2 are so intertwined as to render meaningless the 3 relationship between the companies.</p> <p>4 SPECIAL MASTER POPPITI: Well -- 5 MS. MASON: I believe that's the case 6 that may be missing from this hypothetical situation that 7 Judge Thyng is positing.</p> <p>8 SPECIAL MASTER POPPITI: But aren't you 9 reading that in the conjunctive as opposed to, as I 10 suggested to you earlier, that it may be sufficient but 11 not necessary? I mean, the contract, as I understand it, 12 and without drilling down through the provision that I am 13 going to review at some point, even after the contract -- 14 even after the relationship, even after the -- even after 15 that ends, if memory serves me correctly, there is a 16 five-year period of time when they can pick up the phone, 17 drop an e-mail, write a letter, maybe appear at the 18 offices to say, We want those files. Isn't there an 19 absolute legal right to those files that have nothing to 20 do with the business purpose?</p> <p>21 And the reason why I say "nothing to do 22 with the business purpose," focusing on Judge Farnan's 23 case in Novartis, I believe that there was a business 24 purpose in Novartis because, as I understand Judge</p>	<p>1 place and then Judge Farnan used that to place limits 2 then on further discovery and obtaining further documents 3 from Eon.</p> <p>4 SPECIAL MASTER POPPITI: And the Hexal 5 provision, and I don't see that he is quoting it, but he 6 does -- he certainly is tantamount to a quote, The 7 agreement grants Eon the right to use Hexal's technical 8 information which comprises of the Hexal file in 9 developing products for sale in the United States.</p> <p>10 It sounds to me like it was a limited 11 right; doesn't it to you?</p> <p>12 MR. MILLER: Your Honor, it's always 13 hard to infer things. I mean, if you look at the 14 decision, it seems -- I guess the way I read the decision 15 originally is the assertion was made that Novartis had 16 the right to access additional documents pursuant to the 17 product royalty agreement. And that was not really 18 challenged.</p> <p>19 The issue was they produced the 20 documents -- Novartis had produced the documents that 21 were in its possession that it had received at that 22 point, so the way I read this, and because the provision 23 isn't quoted, it's hard to know, but the way I read this 24 was that it was an accepted understanding that additional</p>

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<p>1 files could have been obtained, I guess, under that</p> <p>2 royalty agreement if they were sought to be obtained.</p> <p>3 SPECIAL MASTER POPPITI: For a specific</p> <p>4 use.</p> <p>5 MR. MILLER: For a specific use.</p> <p>6 SPECIAL MASTER POPPITI: And that --</p> <p>7 MR. MILLER: In the Viewsonic situation,</p> <p>8 the service manuals that we have produced, for example,</p> <p>9 and the exploded drawings are the documents that</p> <p>10 Viewsonic has received under these provisions of the Jean</p> <p>11 agreement that it has in its possession, custody, or</p> <p>12 control. It is not sitting on a cash of other documents</p> <p>13 that Jean has provided to it that show how these products</p> <p>14 are put together.</p> <p>15 It has, as Novartis had, I think in this</p> <p>16 situation, a right to request additional documents for</p> <p>17 its business purposes, but it hasn't done it, and</p> <p>18 question then becomes: Do the Federal Rules envision</p> <p>19 that a party who has a contractual right to obtain</p> <p>20 documents for its business purposes are compelled to take</p> <p>21 whatever measures presumably are required, including, I</p> <p>22 guess, a lawsuit against their supplier, if needed, to</p> <p>23 obtain those documents in order to respond to a discovery</p> <p>24 request? And I think what --</p>	<p>1 Eon because Eon has a legal right to obtain these</p> <p>2 documents pursuant to the property royalty agreement.</p> <p>3 "In opposition, Eon contends that it has</p> <p>4 produced all Hexal file documents in its possession which</p> <p>5 were used in filing its application for FDA approval and</p> <p>6 formulating and developing its accused products.</p> <p>7 "Additionally, Eon contends that the</p> <p>8 Novartis motion finds no support in the Federal Rules of</p> <p>9 Evidence as it demands that Eon request information which</p> <p>10 has not been used in connection with the accused products</p> <p>11 from a non-party who is a potential competitor of</p> <p>12 Novartis in Europe."</p> <p>13 I guess my question is this: The</p> <p>14 document that we are working with, and it may be that it</p> <p>15 is a template and other contracts are similar to this</p> <p>16 template, even after the business relationship ends, even</p> <p>17 after it ends, there is a five-year absolute right to</p> <p>18 access these documents, is there not, without any</p> <p>19 business purpose at all? Anyone want to --</p> <p>20 MS. BRZEZYSKI: That is our</p> <p>21 understanding of our reading of the OEM agreements.</p> <p>22 SPECIAL MASTER POPPITI: Any comments</p> <p>23 then, please?</p> <p>24 MR. MILLER: I am turning to the section</p>
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<p>1 SPECIAL MASTER POPPITI: We are not</p> <p>2 there yet, though. We don't know whether there would be</p> <p>3 a lawsuit.</p> <p>4 MR. MILLER: No, we don't. But the</p> <p>5 question is -- it seems to me that Judge Farnan was</p> <p>6 drawing the line here, saying, No, if you have the</p> <p>7 documents, you have obtained them for business purposes,</p> <p>8 you need to produce them, and Viewsonic has done that</p> <p>9 through the service manuals.</p> <p>10 Those exploded documents and the service</p> <p>11 manuals came from our suppliers, whether it was Jean or</p> <p>12 Delta or anybody else, and that service manual came to us</p> <p>13 from the supplier.</p> <p>14 SPECIAL MASTER POPPITI: You are right</p> <p>15 that I don't have the language of the Novartis document</p> <p>16 in front of me, but even following on, and I think you</p> <p>17 agreed that this is the case, the following two</p> <p>18 paragraphs read, and let me look at those for a moment</p> <p>19 for purposes of sharing with you my thoughts, "Novartis</p> <p>20 contends that Eon's license to access Hexal file</p> <p>21 documents makes every Hexal file document discoverable."</p> <p>22 Makes every one discoverable. "Specifically, Novartis</p> <p>23 contends that all documents covered by the Hexal file are</p> <p>24 relevant to this litigation and are within the custody of</p>	<p>1 to read it.</p> <p>2 SPECIAL MASTER POPPITI: Yeah. Please.</p> <p>3 It's at note ten. And even read the following paragraph.</p> <p>4 While you are reading, I don't want to interrupt your</p> <p>5 thought process, but let me read the next paragraph.</p> <p>6 "Federal Rules of Civil Procedure 34(a) permits a party</p> <p>7 to serve a request for production of documents which are</p> <p>8 within the scope of discovery, and, quote, which are in</p> <p>9 the possession, custody, or control of the party upon</p> <p>10 whom the request is served," citing the rule.</p> <p>11 "If a corporate entity is deemed to be</p> <p>12 in control of the documents sought, a District Court can</p> <p>13 compel the production of these documents regardless of</p> <p>14 whether they are also in the possession and control of a</p> <p>15 non-party."</p> <p>16 And then it cites Pennwalt. And the</p> <p>17 site for Pennwalt is for the proposition that holding</p> <p>18 that, quote, This occurs most often when a parent</p> <p>19 corporation is requested to produce documents of a</p> <p>20 wholly-owned subsidiary; however, in cases in which the</p> <p>21 corporate entities are not parent and subsidiary,</p> <p>22 production is," and it does say "rarely ordered unless</p> <p>23 the respective business operations of such entity, quote,</p> <p>24 are so intertwined as to render meaningless their</p>

Hearing

12 (Pages 42 to 45)

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<p>1 separate corporate identities."</p> <p>2 Now, I understand that in the context of</p> <p>3 Novartis, they are talking about contractual</p> <p>4 arrangements, but they are talking about a contractual</p> <p>5 arrangement that is different from the one that we have</p> <p>6 in front of us, is it not?</p> <p>7 MR. MILLER: The agreement does provide</p> <p>8 access to documents for five years following the date of</p> <p>9 the termination of the agreement.</p> <p>10 SPECIAL MASTER POPPITI: Unfettered.</p> <p>11 MR. MILLER: The way I interpret that is</p> <p>12 these agreements are made and then added on for each</p> <p>13 product, so it would be five years after the termination</p> <p>14 of the, essentially, the production of a particular</p> <p>15 product, they would be available, as opposed to building</p> <p>16 some library if you had a 15-year relationship that would</p> <p>17 be, you know, at the end of that additional five years,</p> <p>18 at the end of that 15-year relationship, it would be a</p> <p>19 seriatim moving five-year period for each product.</p> <p>20 SPECIAL MASTER POPPITI: Well, if that's</p> <p>21 the case, then it may be, and if it is seriatim, it may</p> <p>22 be that it ends after that five-year -- five years after</p> <p>23 the product is no longer in production. It is still,</p> <p>24 however, with respect to each product, five years after</p>	<p>1 for all I know, they had a very broad recitation of</p> <p>2 rights.</p> <p>3 And, in my mind, if I am a company</p> <p>4 that's submitting information to the FDA for approval, I</p> <p>5 would envision that, if I encountered that expense and</p> <p>6 gone through that trouble, I would probably have a</p> <p>7 contract right that would give me rights to more</p> <p>8 information than what I submitted, but if the FDA</p> <p>9 required additional backup information, and/or I needed</p> <p>10 it for my business purpose, I would have a right to get</p> <p>11 it.</p> <p>12 SPECIAL MASTER POPPITI: Well, I guess</p> <p>13 my problem -- and I don't want to beat a dead horse, I</p> <p>14 think I understand your respective positions, but just an</p> <p>15 observation -- I understand that it is LPL's burden, in</p> <p>16 the first instance, but I also understand that if LPL is</p> <p>17 saying, Look at this language and look at this language</p> <p>18 in the context of the entire contract, which I will have</p> <p>19 the opportunity to look at, and if their focus is on</p> <p>20 particular language and it is unfettered, then doesn't it</p> <p>21 become your responsibility to point out other language in</p> <p>22 the contract which suggests that it is only for the</p> <p>23 practical use of that information?</p> <p>24 And if you do that and if you can fit</p>
Page 43	Page 45
<p>1 the date when you need the information for purposes of</p> <p>2 producing the product; correct?</p> <p>3 MR. MILLER: Well, I am hesitating</p> <p>4 because "need" is a difficult word there.</p> <p>5 SPECIAL MASTER POPPITI: How about want?</p> <p>6 I said "need." That was not a well thought out word.</p> <p>7 They want it. They just simply want it.</p> <p>8 MR. MILLER: Viewsonic has, you know, as</p> <p>9 any retailer, as any producer of product does, has</p> <p>10 warranty obligations that would extend beyond, you know,</p> <p>11 for the products produced at the end of the life, would</p> <p>12 continue on beyond the production.</p> <p>13 SPECIAL MASTER POPPITI: I understand</p> <p>14 that. That's not the way the contract reads, is it?</p> <p>15 MR. MILLER: I think Viewsonic has the</p> <p>16 right to acquire those records as is necessary for its</p> <p>17 business purposes, and one of those would, obviously, be</p> <p>18 for filling warranty or servicing obligations post end of</p> <p>19 production of a product, in my mind. And is this</p> <p>20 contract different from the contract Novartis had?, I</p> <p>21 don't know because the Novartis says that the case</p> <p>22 articulates a circumstance where the party was entitled</p> <p>23 to more information, had a legal right to obtain these</p> <p>24 documents pursuant to the product royalty agreement, so,</p>	<p>1 into language in the contract that suggests that it is</p> <p>2 only for the practical use, either during production or</p> <p>3 after production, when there are issues with respect to</p> <p>4 warranties, then it may be that you fit into the teaching</p> <p>5 of Novartis.</p> <p>6 But it seems to me, at some point, the</p> <p>7 burden shifts back to you to say, You know, Vincent, you</p> <p>8 need to be looking at other stuff here in this contract,</p> <p>9 and this other information and the other language in the</p> <p>10 contract points to access for a practical purpose, that</p> <p>11 is, a business purpose.</p> <p>12 MR. MILLER: Your Honor, we are happy</p> <p>13 to --</p> <p>14 SPECIAL MASTER POPPITI: You have got</p> <p>15 the contracts.</p> <p>16 MR. MILLER: We are happy to do that,</p> <p>17 sure. I guess the question I have is: Is the standard</p> <p>18 here, which I had understood the standard, as articulated</p> <p>19 by Judge Farnan, to be the case where the entity's</p> <p>20 relationship is so intertwined as to render meaningless</p> <p>21 their separate corporate identities, because I am happy</p> <p>22 to submit information that shows that that is the case,</p> <p>23 or is it just that we have a right to obtain these</p> <p>24 documents pursuant to this agreement?</p>

Hearing

13 (Pages 46 to 49)

Page 46	Page 48
<p>1 I think those -- to me, those are very</p> <p>2 different standards and I would look for some guidance in</p> <p>3 terms of what we are looking for here would be helpful so</p> <p>4 that if we -- so that we could make a submission that</p> <p>5 would address your particular needs.</p> <p>6 SPECIAL MASTER POPPITI: Well, I think</p> <p>7 the answer is they are certainly different standards,</p> <p>8 but, in my view, as I suggested earlier in our colloquy</p> <p>9 here today, I think a focus on the relationship of the</p> <p>10 entities is sufficient but not necessary.</p> <p>11 In Novartis, Judge Farnan says, at page</p> <p>12 -- well, the page isn't going to help you -- at note 11,</p> <p>13 it is on page 3 of the Lexus site, bottom of the final</p> <p>14 full paragraph on that page, "Rather, the pertinent issue</p> <p>15 is whether AOL and EarthLink have the legal right to</p> <p>16 obtain the information at issue."</p> <p>17 And I keep coming back to that. That</p> <p>18 seems to be the benchmark. And if legal right is framed</p> <p>19 in the context of entity relationships, so be it, but if</p> <p>20 a legal right is framed in the context of a contractual</p> <p>21 relationship, how do I ignore the fact that -- and I</p> <p>22 don't know whether you agree with me or not -- a</p> <p>23 contract, a valid contract, as between two parties, two</p> <p>24 entities, confers legal rights. And if the legal right</p>	<p>1 separate corporate identities."</p> <p>2 I think what magistrate Thyng is saying</p> <p>3 here, as I read this, is she is looking at the question</p> <p>4 of: Do they have a right? And once you look at the</p> <p>5 evaluation of that right, you must put it into the</p> <p>6 context of whether that right is at a level that it does</p> <p>7 evaporate to the separate corporate identities based on</p> <p>8 the nature of the relationship, and these are arm's</p> <p>9 length transactions.</p> <p>10 SPECIAL MASTER POPPITI: Let's finish on</p> <p>11 with, perhaps, her ultimate statement here at the next</p> <p>12 paragraph, "Moreover, as noted in Novartis, a contract</p> <p>13 provision which merely authorizes," and I just think that</p> <p>14 that means practical use, "the party/litigants access to</p> <p>15 information that is in possession of the non-party</p> <p>16 without more is insufficient to establish legal control</p> <p>17 in the Third Circuit."</p> <p>18 And I am inclined to read her "without</p> <p>19 more" as referencing back to the fact that there was no</p> <p>20 contractual provision that provided unfettered access. I</p> <p>21 don't know how to read it any other way in light of the</p> <p>22 language that she chose to use at page -- at note ten and</p> <p>23 then beyond note 12.</p> <p>24 MR. MILLER: When I read that "without</p>
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<p>1 that's conferred is unfettered access to documents, not</p> <p>2 couched in terms of access for a practical business use,</p> <p>3 why isn't that a legal right to obtain the information at</p> <p>4 issue?</p> <p>5 MR. MILLER: Your Honor, I think you</p> <p>6 were quoting from the Inline case, which was Magistrate</p> <p>7 Thyng's, in terms of the legal right question?</p> <p>8 SPECIAL MASTER POPPITI: I was. I am</p> <p>9 sorry, I was.</p> <p>10 MR. MILLER: If, by continuing on in the</p> <p>11 same section from where you were, you are correct, it</p> <p>12 says, "The pertinent issue is whether AOL and EarthLink</p> <p>13 have the legal right to obtain the information at issue."</p> <p>14 SPECIAL MASTER POPPITI: Right.</p> <p>15 MR. MILLER: The very next paragraph,</p> <p>16 which flows onto the following page, discusses the fact</p> <p>17 that the parties deal on a competitive arm's length</p> <p>18 basis.</p> <p>19 SPECIAL MASTER POPPITI: Yes, it does.</p> <p>20 MR. MILLER: And goes on, and, at the</p> <p>21 very end of that provision, end of that section, down by</p> <p>22 note 12, it concludes with, "Those facts evidence that</p> <p>23 the business operations of the TELCOS and AOL and</p> <p>24 EarthLink are not so intertwined as to evaporate their</p>	<p>1 more," I read it as referring back to the statement that</p> <p>2 she concluded that paragraph with, which was that, in an</p> <p>3 arm's length transaction where the relationships are not</p> <p>4 so intertwined as to evaporate their separate corporate</p> <p>5 identities, that's the reference back, in my mind.</p> <p>6 SPECIAL MASTER POPPITI: I understand,</p> <p>7 sir.</p> <p>8 MS. BRZEZYSKI: If I just might add</p> <p>9 right there, I agree with your reading of that provision,</p> <p>10 and I also note, in the prior paragraph that Mr. Miller</p> <p>11 cites to about AOL and EarthLink being not so</p> <p>12 intertwined, I will suggest that, you know, that</p> <p>13 paragraph refers to a specific example where two of the</p> <p>14 telephone companies, the TELCOSs, SBC and Quest actually</p> <p>15 refused to provide information to AOL. And I think it's</p> <p>16 in that context that is very much distinguishable from</p> <p>17 this case where there has been no examples of any refusal</p> <p>18 by Jean or any other OEM to provide this information.</p> <p>19 And, here, we don't have Viewsonic competing with Jean or</p> <p>20 any of its other OEMs. They are closely working together</p> <p>21 to manufacture these products.</p> <p>22 SPECIAL MASTER POPPITI: Okay.</p> <p>23 MR. MILLER: Your Honor, I think that,</p> <p>24 of course, raises the reason why the evaporation of the</p>

Hearing

14 (Pages 50 to 53)

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<p>1 corporate separate identities is so important because, 2 otherwise, what's the enforcement mechanism that would be 3 employed if we are compelled -- if Viewsonic or any 4 company is compelled to obtain documents from a 5 recalcitrant supplier if we are not -- if our 6 relationships are not so intertwined as to, essentially, 7 say that there is no separate corporate identity, we 8 can't force those documents into the United States 9 because we don't control Jean.</p> <p>10 We don't have the ability to dictate to 11 these independent third-party companies, and, certainly, 12 LPL hasn't, you know, submitted any suggestion that we 13 do, to compel them to step forward with this information.</p> <p>14 SPECIAL MASTER POPPITI: Well, but 15 that's a question that I don't need to answer now, is it? 16 I mean, if -- first of all, posit for me that you have -- 17 forget the conversation we have had up to this point, but 18 if I posit to you and you accept the proposition that you 19 have an absolute right to these documents at any time for 20 absolutely no reason whatsoever, and if I conclude that 21 is a contractual right, do I need to be concerned about 22 what happens when that right is asserted?</p> <p>23 I mean, I don't think I do. I mean, it 24 may very well be that LPL -- that you -- that I direct</p>	<p>1 produce them? That's why I think the standard is what it 2 is, which is this interrelationship between these 3 entities that there is no separateness in order to force 4 a control because, otherwise, I'd be in exactly that 5 paradox.</p> <p>6 SPECIAL MASTER POPPITI: Let me do this: 7 If you are satisfied with your record at this point, then 8 the record on this issue is closed.</p> <p>9 If you are inclined to go back and tell 10 me whether there is more focused Third Circuit decisional 11 law dealing with specifically issues of contractual 12 rights and how and whether the Third Circuit 13 distinguishes those from those cases where there are 14 intertwined corporate entities, then I'd like to be aware 15 of it.</p> <p>16 I do have one question of LPL, and I 17 think I know the answer to it, but: Why didn't you 18 pursue this through third-party discovery?</p> <p>19 MS. BRZEZYSKI: Your Honor, our first 20 course of action was to attempt to get these documents 21 through Viewsonic. We believe Viewsonic, as stated in 22 our papers and oral argument today, has the absolute 23 right to these documents, that Viewsonic has misstated 24 the standard in the Third Circuit. And I think that</p>
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<p>1 that you assert your right, because you have control of 2 it, and it may very well be that each of your OEMs says, 3 you know, respectfully, Pack sand, we are not going to 4 honor the contract, and I don't know where we are then.</p> <p>5 MR. MILLER: But I think that's exactly 6 why the standard is, as articulated in both Inline and 7 Novartis, that the relationship has to be so intertwined 8 as to indicate that there is no separate corporate 9 identity and a mere contract provision giving you the 10 right to access those information is not enough under the 11 Third Circuit law because you don't want to put a party 12 in a position of facing potential contempt sanctions 13 because they have a contract right that is not -- that a 14 party won't live up to.</p> <p>15 SPECIAL MASTER POPPITI: You are not 16 suggesting that if you -- if you comply with a direction 17 to assert your right and your OEM says, Sorry, we are not 18 going to comply, that it would be appropriate to sanction 19 your client, are you?</p> <p>20 MR. MILLER: That's my great fear, Your 21 Honor. I don't want to be in a situation where I am -- 22 my client is facing sanctions because if these documents 23 are in my client's, quote, control, then what is the, you 24 know, what's the justification for not forcing them to</p>	<p>1 Viewsonic is really -- is getting ahead of itself where 2 they have not even attempted to request or obtain these 3 documents from its OEMs. You know, by now suggesting 4 that there may be, possibly, a dispute by its OEMs, that 5 has not even been presented yet, is clearly premature.</p> <p>6 Also, Your Honor, these OEMs are foreign 7 entities in Taiwan, and, certainly, service of 8 third-party subpoenas would be extremely difficult and 9 would likely not be available within the confines of our 10 discovery schedule.</p> <p>11 SPECIAL MASTER POPPITI: And I expected 12 you would say that. I would make one other observation: 13 If I come down on the side of LPL and propose, in finding 14 and recommendations to the Court, that there is control, 15 and if the Court accepts that, and if an issue winds up 16 back on my desk with respect to the third parties 17 abrogating their responsibility under the contract, the 18 only thing I certainly would expect you would find me 19 asking for is the nature of the request made and expect 20 that the nature of that request is a pure and simple 21 request, and that there is nothing that is in the file or 22 the developed file which would suggest that the -- that 23 Viewsonic was standing in the way of that production 24 and/or suggesting that the OEMs be recalcitrant.</p>

Hearing

15 (Pages 54 to 57)

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<p>1 But, in any event, I will take the</p> <p>2 matter under advisement and issue a proposed finding and</p> <p>3 recommendation.</p> <p>4 MS. MASON: Your Honor, we would like</p> <p>5 the opportunity to submit the additional case law, as</p> <p>6 Your Honor suggested, together with the right to identify</p> <p>7 the additional contract terms.</p> <p>8 SPECIAL MASTER POPPITI: Yeah. I want</p> <p>9 you to do that because I put you on a short time frame</p> <p>10 last week. I think I asked for you to do it in the</p> <p>11 morning session. You all did me the courtesy of doing it</p> <p>12 by the lunch break, and I know it was a request under a</p> <p>13 little bit of pressure.</p> <p>14 I will want both sides to have the</p> <p>15 opportunity to give me any further thoughts on it. I'd</p> <p>16 like it done in rather short order, and I'd like to hear</p> <p>17 a proposal with respect to that.</p> <p>18 MS. MASON: Your Honor, I am sorry, I am</p> <p>19 just pulling out the calendar. Would a week from today</p> <p>20 be acceptable? And I would propose if it's</p> <p>21 supplementation, that the parties could make a</p> <p>22 contemporaneous submission unless Your Honor thinks</p> <p>23 otherwise.</p> <p>24 SPECIAL MASTER POPPITI: No,</p>	<p>1 of writing something, doing it by the 10th is not going</p> <p>2 to forestall my getting something to you in short order</p> <p>3 due course. So, the 10th, end of business, is fine.</p> <p>4 MS. BRZEZYSKI: Your Honor, can we agree</p> <p>5 on a two-page page limit?</p> <p>6 SPECIAL MASTER POPPITI: Yeah. I see no</p> <p>7 reason why you shouldn't be able to do what you have done</p> <p>8 before, two pages and attach the authority if there is</p> <p>9 any authority to be had.</p> <p>10 MS. MASON: Thank you, Your Honor. When</p> <p>11 you say "close of business," is five p.m. acceptable?</p> <p>12 SPECIAL MASTER POPPITI: Five p.m. is</p> <p>13 acceptable.</p> <p>14 MS. MASON: Thank you.</p> <p>15 SPECIAL MASTER POPPITI: Thank you.</p> <p>16 Okay. Let me just go off record for a moment so I can</p> <p>17 take some stock of where we are, please.</p> <p>18 (Off the record.)</p> <p>19 SPECIAL MASTER POPPITI: Counsel, we are</p> <p>20 back on. I believe that that covers the field of what we</p> <p>21 intended to accomplish.</p> <p>22 I know that I have got several matters</p> <p>23 that I reserved for consideration and ultimate writing on</p> <p>24 proposed findings of fact and conclusions, and if you all</p>
Page 55	Page 57
<p>1 contemporaneous makes senses. Let's just talk about the</p> <p>2 date.</p> <p>3 MS. MASON: How about January 10th, Your</p> <p>4 Honor?</p> <p>5 MS. BRZEZYSKI: Your Honor, I think that</p> <p>6 we can do this much sooner and I would prefer by Monday,</p> <p>7 the 8th.</p> <p>8 Also, Your Honor, I am not aware of any</p> <p>9 other controlling authority in the Third Circuit, any</p> <p>10 other cases.</p> <p>11 SPECIAL MASTER POPPITI: Well, if there</p> <p>12 isn't, then Miss Mason's submittal will be very short.</p> <p>13 MS. BRZEZYSKI: I am certainly not aware</p> <p>14 of any, and I would certainly like the opportunity to</p> <p>15 respond if Ms. Mason were to come forth with any cases in</p> <p>16 the Third Circuit or elsewhere, but I am not aware of any</p> <p>17 other controlling authority from the Third Circuit.</p> <p>18 SPECIAL MASTER POPPITI: I expect that</p> <p>19 you all are much more adept at ferreting out, through</p> <p>20 legal research, Third Circuit cases that apply. You are</p> <p>21 much better at doing that than the person that's talking</p> <p>22 to you on this side of the phone, so I am going to</p> <p>23 require that there be a supplemental and it be</p> <p>24 simultaneous, and knowing I am going to be in a position</p>	<p>1 agree with me that that is the case, I just want to make</p> <p>2 sure that we circle back through the January 3rd document</p> <p>3 and make sure everything is covered that will, of course,</p> <p>4 be supplemented, and I would ask counsel to do me the</p> <p>5 courtesy of what you did for January 3 for today.</p> <p>6 Am I accurate in suggesting that we have</p> <p>7 accomplished what we set out to do?</p> <p>8 MR. CHRISTENSON: Your Honor, there are,</p> <p>9 I believe, two essential follow-up items from our prior</p> <p>10 discussion. The first was you had indicated that you may</p> <p>11 want to circle back --</p> <p>12 SPECIAL MASTER POPPITI: I did.</p> <p>13 MR. CHRISTENSON: -- to the inducement</p> <p>14 and damages issues that we discussed.</p> <p>15 SPECIAL MASTER POPPITI: I did.</p> <p>16 MR. CHRISTENSON: And, so, I don't know</p> <p>17 if that's something you want to discuss further or if</p> <p>18 that's just going to be something that we will hear from</p> <p>19 you on in your order?</p> <p>20 SPECIAL MASTER POPPITI: I think I</p> <p>21 recall asking you whether your respective records were</p> <p>22 what you wanted them to be, and expecting that that is</p> <p>23 the case, I just want to deal with that in my ultimate</p> <p>24 order.</p>